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8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**

10 NEIGHBORHOOD NEUROPATHY  
 CENTER OF RENO, LLC, individually  
 11 and on behalf of a class of similarly  
 situated individuals,

12 Plaintiff,

13 v.

14 MEDRISK, LLC, a Delaware limited  
 15 liability company,

16 Defendant.

Case No. 3:19-cv-00619-LRH-WGC

**DEFENDANT MEDRISK, LLC'S  
 MOTION FOR SUMMARY JUDGMENT**

**(ORAL ARGUMENT REQUESTED)**

17 Pursuant to Federal Rule of Civil Procedure 56, Defendant MedRisk, LLC  
 18 (“MedRisk”), by and through its attorneys of record, hereby move for summary  
 19 judgment. In support of this motion, MedRisk relies on the following points and  
 20 authorities, the attached declaration and exhibits, the filed documents in this action,  
 21 and any argument the Court may hear.

22 **POINTS AND AUTHORITIES**

23 **I. INTRODUCTION**

24 Plaintiff’s sole claim – under the Junk Fax Prevention Act, 47 U.S.C. § 227 *et*  
 25 *seq.* (“JFPA”) – fails as a matter of law because the faxes that form the basis for the  
 26 claim were not “unsolicited advertisements.” The undisputed facts demonstrate that  
 27 Plaintiff was part of MedRisk’s provider network at the time the faxes were sent, and  
 28 MedRisk sent the faxes purely for informational purposes so that Plaintiff could

1 identify MedRisk clients and appropriately process patients associated with MedRisk  
2 clients. Because the faxes at issue were informational, and not “unsolicited  
3 advertisements,” they did not – as a matter of law – violate the JFPA.

## 4 II. STATEMENT OF UNDISPUTED FACTS

5 MedRisk is a specialty managed care organization in the workers’ compensation  
6 realm, which means that MedRisk serves network client payers (*e.g.*, insurance  
7 companies, self-insured employers) by, among other things, linking payers to  
8 MedRisk’s network of participating health care providers. In some instances, MedRisk  
9 will contract with certain companies, such as OptumHealth Care Solutions, Inc.  
10 (“Optum”), to serve as an intermediary network to give MedRisk network clients access  
11 to even more health care providers, such as Optum network providers that elect to opt  
12 into MedRisk’s network. Declaration of Jennifer Hermann (“Hermann Decl.”), ¶ 8.

13 MedRisk is responsible for keeping all of its network providers informed of the  
14 identity of new MedRisk network clients, so that providers understand that patients  
15 associated with a new MedRisk network client should be recognized and processed as  
16 MedRisk network patients. Hermann Decl., ¶ 9. For this reason, MedRisk sends faxes  
17 to keep MedRisk network providers informed of new MedRisk network clients. As set  
18 forth in MedRisk’s Provider Relations Administration Manual: “client listings are  
19 distributed to providers monthly. Please pay special attention to these notices as they  
20 often call out new clients who are now working with MedRisk.” *Id.* It is not part of  
21 MedRisk’s business model to sell anything to the providers in its network. Hermann  
22 Decl., ¶ 10.

23 In 2017, Plaintiff became a provider in the Optum network and Plaintiff also  
24 simultaneously opted in to be included in MedRisk’s network. Hermann Decl., ¶ 11.  
25 From then to the present day, Plaintiff has continuously been part of the MedRisk  
26 network.

27 In 2019, after Plaintiff already was part of MedRisk’s network, Plaintiff received  
28 the alleged faxes that form the basis for its Complaint. Hermann Decl., ¶ 12. These

1 faxes varied in their specific content, but they all were entitled “Network News,” and  
2 they said “MedRisk Client Update” or “MedRisk Client Listing Update.” Hermann  
3 Decl., Ex. D. The faxes then generally identified new MedRisk clients, or contained  
4 lists of MedRisk clients, and they provided both reminders that patients associated  
5 with such clients should be processed as MedRisk network patients, and they  
6 contained information about processing. *Id.* For example, one fax instructed: “Please  
7 notify MedRisk before initiating treatment on these patients by calling us at 800-225-  
8 9625. All bills associated with these clients should be sent to MedRisk to avoid delays  
9 in claims processing. Please share this critical information with your staff.” *Id.*

10 Several of these faxes recognized the ongoing relationship between MedRisk and  
11 the fax recipient (*i.e.*, Plaintiff), containing such statements as “we . . . are fortunate  
12 to partner with you,” or “we are thankful to team up with your clinics.” *Id.*

13 Based on these faxes, Plaintiff, on behalf of a putative class, alleges a single  
14 claim for alleged violation of the JFPA, contending that the faxes constituted  
15 “unsolicited advertisements.” (ECF No. 1 ¶¶ 28-42).

### 16 III. STANDARD OF REVIEW

17 Federal Rule of Civil Procedure 56 authorizes summary judgment when the  
18 pleadings, depositions, answers to interrogatories, and admissions on file, together  
19 with the affidavits, if any, show that “there is no genuine dispute as to any material  
20 fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a).  
21 The moving party bears the burden on showing that there are no genuine issues of  
22 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To do so in a case  
23 where, as here, the non-moving party bears the burden of proving a claim, the moving  
24 party may either: (1) present evidence to negate an essential element of the non-  
25 moving party’s case; or (2) demonstrate that the non-moving party lacks evidence to  
26 establish an element essential to that party’s case. *Id.* at 323-24; *see also Walker v.*  
27 *State Farm Mut. Auto. Ins. Co.*, 259 F. Supp. 3d 1139, 1144 (D. Nev. Apr. 26, 2017).  
28

Once the moving party satisfies its initial burden, the burden shifts to the non-movant to “go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial.” *Walker*, 259 F. Supp. 3d at 1144. The non-moving party cannot defeat summary judgment by relying on mere speculation, conjecture, or fantasy. *O.S.C. Corp. v. Apple Comput., Inc.*, 792 F.2d 1464, 1467 (9th Cir. 1986); *accord Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (“[T]his court has refused to find a ‘genuine issue’ where the only evidence presented is ‘uncorroborated and self-serving’ testimony.”) (quoting *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996)). If the non-moving party fails to carry her burden, then the “court has a duty to grant the motion for summary judgment.” *O.S.C. Corp.*, 792 F.2d at 1467.

#### IV. MEDRISK IS ENTITLED TO SUMMARY JUDGMENT

The JFPA prohibits the sending of an “unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C). Generally, a fax is an “unsolicited advertisement” if (1) the fax, on its face, promotes the commercial availability or quality of any property, goods, or services, or (2) the fax is a pretext for a larger advertising scheme. *Robert Mauthe, M.D., P.C. v. Optum, Inc.*, No. CV 17-1643, 2018 WL 3609012, at \*3 (E.D. Pa. July 27, 2018). The FCC has determined that informational faxes, such as regularly-scheduled newsletters, do not qualify as unsolicited advertisements in violation of the JFPA. *Id.* at \*10 (citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 FR 25967-01, 25973).

Here, Plaintiff alleges that the MedRisk faxes at issue were advertising because they “solicit[ed] Plaintiff to accept MedRisk clients at a reduced cost.” (Compl. ¶ 14). Plaintiff’s theory of advertising reflects a fundamental misunderstanding of MedRisk’s business and the underlying facts in this case.

As set forth above, it was only after Plaintiff’s election in 2017 to opt into the MedRisk network that Plaintiff received (in 2019) the MedRisk faxes at issue. Thus, contrary to Plaintiff’s theory of advertising, MedRisk’s faxes were not “soliciting”

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1 Plaintiff to become part of the MedRisk network; Plaintiff already was part of the  
2 MedRisk network when it received the faxes.

3 Nor is there any other basis to contend that the faxes at issue were advertising.  
4 First, the faxes facially include no commercial advertisement – *i.e.*, they do not promote  
5 the sale of any good or service to the providers to whom they are sent. Instead, they  
6 simply advised providers as to the identity of new MedRisk network clients, and  
7 provided instructions for processing MedRisk network patients.

8 Second, the MedRisk faxes are in no way a pretext for a larger advertising  
9 scheme. As an initial matter, Plaintiff does not even allege that the faxes were any  
10 sort of “pretext” for a larger advertising campaign, and so any such theory fails for that  
11 reason alone. *Machonis v. Universal Survey Ctr., Inc.*, 2020 U.S. Dist. LEXIS 31330,  
12 \*25 (S.D.N.Y. Feb. 21, 2020) (“[A]s Plaintiff has not pleaded any allegation that the  
13 Fax was intended to serve as a pretext for Defendant’s advertising of any commercial  
14 products or services (and, indeed, has conceded in its opposition papers that it is not  
15 relying on any such theory of liability), I recommend that the Complaint be dismissed  
16 under Rule 12(b)(6) for failure to state a viable claim under the TCPA.”).

17 Moreover, the notion that the faxes at issue could have been a pretext for  
18 advertising is belied by the fact that it is not part of MedRisk’s business model to sell  
19 **anything** to the providers in its network. Instead, the faxes serve MedRisk’s network  
20 clients by informing providers to recognize and process patients associated with those  
21 network clients as MedRisk network patients.

22 Factually analogous case law supports MedRisk’s arguments. For example, in  
23 *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218 (6<sup>th</sup> Cir.  
24 2015), a pharmacy benefit manager routinely faxed healthcare providers lists of  
25 medicines available in the health care plans offered by the plan sponsors for whom the  
26 manager worked. *Id.* at 220. “That way, the healthcare providers will know which  
27 medications are covered by their patients’ healthcare plans.” *Id.* The *Sandusky* court  
28 rejected the argument that these faxes were advertising for purposes of the JFPA,

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1 reasoning that they were purely informational: “They call items (medications) and  
2 services (Medco’s formulary) to Sandusky’s attention, yes. But no record evidence  
3 shows that they do so because the drugs or Medco’s services are for sale by Medco, now  
4 or in the future. In fact, the record shows that Medco has no interest whatsoever in  
5 soliciting business from Sandusky. . . . The record instead shows that the faxes list the  
6 drugs in a purely informational, non-pecuniary sense: to inform Sandusky what drugs  
7 its patients might prefer, based on Medco’s formulary—a paid service already rendered  
8 not to Sandusky but to Medco’s clients.” *See also Orrington*, 2019 WL 4934696, at  
9 \*\*15-16. (“[T]he undisputed facts show that Scion processes claims for dentists on  
10 behalf of UHC and other insurance providers. It maintains an online Portal through  
11 which dentists in the supported networks may submit claims. It trains dentists in the  
12 supported networks free of charge and sent a fax advising them of available training  
13 on new features of the online system. The fax offered no products or services for sale.  
14 . . . This fax was not an advertisement.”).

15 Likewise here, MedRisk’s faxes to Plaintiff did not intend to sell anything to  
16 Plaintiff. Rather, in service of MedRisk’s own network clients, these faxes simply  
17 informed Plaintiff, as a MedRisk network provider, of the identity of MedRisk network  
18 clients.

19 In sum, the facts are undisputed that the faxes at issue were not “unsolicited  
20 advertisements,” and Plaintiff’s JFPA therefore fails as a matter of law.

## 21 V. CONCLUSION

22 For these reasons, the Court should grant MedRisk’s motion, dismiss the claim  
23 against MedRisk with prejudice, and grant MedRisk such other relief as the Court  
24 deems proper.

25  
26  
27 DATED this 9th day of March, 2020.  
28

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**CERTIFICATE OF SERVICE**

I certify that on March 9, 2020, and pursuant to FRCP 5, a true copy of the foregoing **DEFENDANT MEDRISK, LLC'S MOTION FOR SUMMARY JUDGMENT** was filed via the Court's CM/ECF System and electronically served on the following parties:

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**INDEX OF EXHIBITS**

<b>EXHIBIT</b>	<b>DESCRIPTION</b>
A	OptumHealth Care Solutions, LLC Provider Agreement
B	OptumHealth Care Solutions, Inc. Workers' Compensation & Auto Liability Opt-in / Opt-Out Form
C	MedRisk's Provider Relations Administration Manual
D	Copies of the faxes attached to NNCR's complaint in this action

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*Attorneys for Defendant MedRisk, LLC*

**UNITED STATES DISTRICT COURT**

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NEIGHBORHOOD NEUROPATHY  
CENTER OF RENO, LLC, individually  
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MEDRISK, LLC, a Delaware limited  
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Case No. 3:19-cv-00619-LRH-WGC

**DECLARATION OF JENNIFER  
HERMANN IN SUPPORT OF  
MEDRISK, LLC'S MOTION FOR  
SUMMARY JUDGMENT**

**DECLARATION OF JENNIFER HERMANN**

1. I, Jennifer Hermann, pursuant to 28 U.S.C. § 1746, declare as follows:
2. I am Vice President of Provider Management for MedRisk, LLC ("MedRisk"). My responsibilities include, among other things, oversight of the contracting, credentialing and management of the MedRisk physical medicine provider network.
3. The facts discussed below are based on my review of MedRisk's business records and the knowledge I have acquired in the course of my duties with MedRisk, and are true and correct to the best of my knowledge and belief.

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- 1           4. Exhibit A hereto is a true and correct copy of the “OptumHealth Care  
2           Solutions, LLC Provider Agreement” between OptumHealth Care  
3           Solutions, LLC (“Optum”) and Neighborhood Neuropathy Center of Reno,  
4           LLC (“NNCR”), which has been in effect from the end of 2017 to the  
5           present, and is contained in MedRisk’s business records.
- 6           5. Exhibit B hereto is a true and correct copy of the “OptumHealth Care  
7           Solutions, Inc. (Optum) Workers’ Compensation & Auto Liability Opt-in /  
8           Opt-Out Form,” under which NNCR in 2017 opted into, among other  
9           networks, the MedRisk network. The foregoing Form is contained in  
10          MedRisk’s business records.
- 11          6. Exhibit C hereto is a true and correct copy of “MedRisk’s Provider Relations  
12          Administration Manual,” which has been in effect from 1996 to the present,  
13          and is contained in MedRisk’s business records.
- 14          7. Exhibit D hereto are true and correct copies of the faxes attached to  
15          NNCR’s complaint in this action.
- 16          8. MedRisk is a specialty managed care organization in the workers  
17          compensation realm, which means that MedRisk serves network client  
18          payers (e.g., insurance companies, self-insured employers) by, among other  
19          things, linking payers to MedRisk’s network of participating health care  
20          providers. In some instances, MedRisk will contract with certain  
21          companies, such as Optum, to serve as an intermediary network to give  
22          MedRisk network clients access to even more health care providers, such as  
23          Optum network providers that elect to opt into MedRisk’s network.
- 24          9. MedRisk is responsible for keeping all of its network providers informed of  
25          the identity of new MedRisk network clients, so that providers understand  
26          that patients associated with a new MedRisk network client should be  
27          recognized and processed as MedRisk network patients. For this reason,  
28          MedRisk sends faxes to keep MedRisk network providers informed of new

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1 MedRisk network clients. As set forth in MedRisk's Provider Relations  
2 Administration Manual: "client listings are distributed to providers  
3 monthly. Please pay special attention to these notices as they often call out  
4 new clients who are now working with MedRisk."

5 10. It is not part of MedRisk's business model to sell anything to the providers  
6 in its network.

7 11. As demonstrated by Exhibits A and B hereto, in 2017, NNCR became a provider in the  
8 Optum network, and NNCR also simultaneously opted in to be included in MedRisk's  
9 network. NNCR has been part of MedRisk's Network since 2017 when it signed the  
10 Form, a copy of which is attached hereto as Exhibit B, to the present.

11 12. All of the faxes that are attached as Exhibit D hereto were sent by MedRisk to NNCR  
12 in 2019.

13 Executed on this 3<sup>rd</sup> day of March, 2020.

14  
15  
16 /s/ Jennifer N. Hermann